(1)

Supreme Court, U.S.
FILED

No. 10-128

JUN 1 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Daniel Ray Unger,

Petitioner

v.

Greg Taylor; John Smith; Bryan Chason; Zak Montoya; Carl Davis; Anderson County, Texas;

Respondents

On Petition For Writ Of Certiorari

To the United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Daniel Ray Unger
General Delivery
Grapeland, Texas 75844
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QUESTIONS PRESENTED FOR REVIEW

1. Are the posterity of the Sovereign American People immune from the jurisdiction of the courts of the United States and the States in accordance with the Foreign Sovereign Immunities Act as codified in 28 U.S.C. § 1330, §§ 1602-1611?

2. Can a person who makes a timely claim of sovereign immunity be lawfully 1) arrested without writ, warrant or authority for a minor traffic offense; 2) incarcerated for two days before being taken immediately before a magistrate for a probable cause determination; 3) re-incarcerated by a magistrate's verbal order, prior to any charges being filed or a probable cause determination being made; 4) incarcerated for two days and two nights without being provided a bed or bedding?

3. Are the sovereign American People required to have a driver's license and proof of insurance in order to lawfully travel in an automobile upon the public highways?

4. Did the trial court judge abuse his discretion and deny Petitioner's right to due process of law and right to a fair trial when the said judge proceeded to hear a case after Petitioner timely filed an unsworn declaration [28 U.S.C. § 1746] alleging bias and prejudice.

LIST OF PARTIES IN COURT BELOW

1. Daniel Ray Unger
2. Sheriff Greg Taylor
3. Deputy John Smith
4. Deputy Bryan Chason
5. Jailor Zak Montoya
6. Justice Carl Davis
7. Anderson County, Texas

Corporate Disclosure Statement:

Not Applicable: There is no publicly owned corporation involved in this cause.

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CITATIONS

The final judgment of the District Court is shown in Appendix A.

The United States Court of Appeals for the Fifth Circuit determined that its opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4. However, the opinion is provided in Appendix B.

STATEMENT OF BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on March 02, 2010. A copy of that decision is appended to this petition in the appendix. Petitioner timely filed and served this Petition for Certiorari on June 1, 2010. Therefore, this Court has jurisdiction of this cause pursuant to 28 U.S.C. § 1254(1), and Art. III. of the Constitution for the United States of America.

CONSTITUTIONAL, Statutes, and etc. Authorities

Articles of Confederation Article IV:

> *The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State,...*

Constitution for the United States of America, Art. IV. Section 2[1]:

> *The Citizens of each State shall be entitled to all Privileges and immunities of Citizens in the several States.*

Amendment IV. Bill of Rights:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches*

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. Bill of Rights:

No person shall be...deprived of life, liberty or property, without due process of law;...

28 U.S.C. § 1332(e):

(e) The word "States" as used in this section includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1603:

For purposes of this Chapter-
(a) A "foreign state", ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity-
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof,... and
(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1604:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

STATEMENT OF THE CASE

This case arises from violation of constitutionally protected rights under color of law and for common law torts which

began when Petitioner was stopped at a routine traffic stop. The basic facts show that Petitioner was entitled to summary judgment as a matter of law and are as follows:

On Friday October 28, 2005, around 10:30 A.M. Petitioner was stopped by Deputy Respondent(s) allegedly for "defective equipment exhaust". Respondent(s) asked Petitioner for his driver's license and proof of liability insurance, and Petitioner replied that he had neither; and also claimed that as the direct posterity of the sovereign American people he had sovereign immunity, was not required to have a driver's license or insurance, and could not be arrested for minor traffic offenses [It is undisputed that Petitioner is the direct posterity of John W. Unger who served as a border ranger and ensign in the American Revolutionary War, and who had taken the Oath of Allegiance to the Commonwealth of Pennsylvania in 1776]. Respondent(s) arrested Petitioner, who then demanded to be taken to the precinct judge [Justice of the Peace Linda Ray, whose court was open during normal business hours] located a few blocks from

the stop. Instead Petitioner was jailed by Respondent(s) without writ, warrant or authority and before being taken before a magistrate for a probable cause determination or a determination of sovereign immunity. The Justice of the Peace Linda Ray, having jurisdiction in this precinct was only a few blocks from the stop location and her office/court was open during normal business hours.

While incarcerated, Respondent(s) denied Petitioner use of the phone, legal papers delivered by his wife, contact with his family, bed and bedding, and was denied access to the courts as punishment as a pretrial detainee. Bedding which Petitioner acquired from another inmate [who was being transferred to another facility] was taken from him by Respondent(s). Petitioner was also held in the holding tank [designed as a temporary holding facility] for the duration of his incarceration, which was two days and two nights.

Petitioner was taken before a Respondent Justice of the Peace Carl Davis, who had no personal or territorial jurisdiction over Petitioner, on Saturday October 29, 2005 at approximately 1:47 p.m. A purported hearing was held at the jail, a

hearing which was not open to the public. The purpose of the hearing was to illicit a plea of not guilty or guilty from Petitioner. Respondent magistrate claimed Petitioner was charged with no driver's license, no insurance, and defective equipment exhaust, but these alleged charges were based only upon internal jail paperwork, as no sworn complaints had been filed with any court as required by law. Respondent magistrate asked Petitioner to enter a plea of not guilty or guilty based upon the information reflected upon the internal jail documents. However, instead Petitioner made a claim of sovereign immunity. Furthermore, internal jail documents show Respondent magistrate made no determination of probable cause; and furthermore, no witnesses were called to testify against Petitioner. It is undisputed that Petitioner made a claim of sovereign immunity pursuant to the Foreign Sovereign Immunities Act 28 U.S.C. § 1604, and said claim was disregarded by Respondent magistrate. After Respondent magistrate disregarded Petitioner's claim of sovereign immunity, Petitioner requested pencil and paper to make a written claim of immunity, but Respondent magistrate

refused this request. Despite the fact that no charges had been filed with any court, that no probable cause determination had been made by the Respondent magistrate, and Petitioner's claim of sovereign immunity, Respondent magistrate remanded Petitioner to incarceration pending the posting of $1500.00 bale/bond. Petitioner eventually posted $1500.00 bond, which was later returned, and Petitioner was released pursuant to Writ of Habeas Corpus. Petitioner was never prosecuted, nor were any charges filed against, Petitioner.

On October 27, 2006 Petitioner instituted this action in the United States District Court for common law torts as this action was brought as a diversity claim pursuant to 28 U.S.C. § 1332(a)(4) and Art. III.; and for violations of rights under color of law pursuant to 42 U.S.C. § 1983.

During the trial Petitioner was denied his right to due process of law and a fair trial by the trial court on a continual basis. The trial court denied Petitioner's motion for summary judgment which should have been granted as a matter of law; and the trial court partially granted Respondent(s)' motion for summary judgment. The trial

court gave no consideration to Petitioner's claim of sovereign immunity and Petitioner's claimed right to travel upon the public highways as a matter of right. On June 10, 2008, Petitioner timely filed an unsworn declaration [28 U.S.C. § 1746] pursuant to 28 U.S.C. §§ 144 and 455(a) alleging bias and prejudice on the part of the trial court. On June 11, 2008, the trial court issued an order denying Petitioner's declaration of bias and prejudice without setting the matter for hearing. In the order the trial court addresses two of the seven instances of bias and prejudice by essentially whitewashing over the issues and stating the court had rectified the complained of incidences. The trial court then determined that Petitioner's remaining complaints were either not accurate or not meritorious without explanation.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed on March 2, 2010, but misstated many of the facts and issues brought before it, while ignoring others. The Fifth Circuit, although briefly referring to Petitioner's claim to sovereign immunity, did not address this point.

The Fifth Circuit also determined that, after trial on the merits, Petitioner's motion for summary judgment becomes moot. However, the Fifth Circuit failed to address the issue presented concerning Petitioner's right to have summary judgment granted as a matter of law.

The Fifth Circuit also failed to determine if Petitioner had a right to travel upon the public highway as a matter of right without having to have a driver's license or proof of insurance. Although the Fifth Circuit addressed the issue concerning the right to travel indirectly, it never confronted the driver's license or insurance issue requirement.

The Fifth Circuit further erroneously found that the district court did not abuse its discretion in denying Petitioner's declaration of bias or prejudice.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Eastern District of Texas had undisputed jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1332(a)(4),

1343(a)(3), 1603(a), 42 U.S.C. 1983, and Art. III. of the Constitution for the United States of America.

The District Court's decision was duly appealed. District Court entered final judgment on July 23, 2008, but it was not mailed until July 24, 2008. Petitioner filed his original notice of appeal on July 24, 2008, prior to having received the District Court's 'final judgment'. Petitioner later filed an amended notice of appeal on July 31, 2008, which included the final judgment as an issue for appeal.

The United States Court of Appeals for the Fifth Circuit had jurisdiction to review the decision of the United States District Court for the Eastern District of Texas pursuant to 28 U.S.C. § 1291.

ARGUMENT FOR ALLOWANCE OF WRIT

The decision below should be reviewed because it presents an issue [concerning sovereign immunity] for the first time and which the Fifth Circuit neglected to address, and in doing so, the Fifth Circuit has effectively negated Petitioner's claim

and right of sovereign immunity pursuant to the Foreign Sovereign Immunities Act as codified in 28 U.S.C. §§ 1602-1611. The Fifth Circuit's failure to properly address and extend sovereign immunity to Petitioner, has disrupted the orderly administration of Petitioner's claim for sovereign immunity; and in doing so has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

The decision below should be reviewed because the Fifth Circuit's decision infringes upon a basic constitutional right, the right to liberty, by requiring Petitioner to obtain a license and insurance prior to exercising his right to travel while using an automobile as a means of conveyance. This decision by the Fifth Circuit is in conflict with two decisions made by this Court in **Williams v. Fears**, 179 U.S.270 at 274 which states in pertinent part:

> *Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the*

> *right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.*

And in **Packard v. Banton**, 264 U.S. 140 at 145 which states in pertinent part:

> *Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former.*

The Fifth Circuit has entered a decision in conflict with this Court, one which infringes upon one of the most protected basic rights of personal liberty, an important matter so as to call for the exercise of this Court's supervisory power to correct this infringement.

The Fifth Circuit has failed to address Petitioner's issue concerning that his motion for summary judgment should have been granted as a matter of law. This decision by the Fifth Circuit is in conflict with the decision made in ***Schaefer v. State Ins. Fund***, 207 F.3d 139, 142 stating:

> "*although normally 'where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed,* ***this rule does not apply where the district court's error was purely one of law.***" [emphasis added]

The Fifth Circuit has entered a decision in conflict with the decision of the Second Circuit on the same important matter so as to call for an exercise of the Court's supervisory power to determine this important issue.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: 7/21/2010

Respectfully submitted,

Daniel Ray Unger

Supreme Court, U.S.
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No. 10-128

In The

Supreme Court of the United States

Daniel Ray Unger,

Petitioner

v.

Greg Taylor; John Smith; Bryan Chason; Zak Montoya; Carl Davis; Anderson County, Texas;

Respondents

On Petition For Writ Of Certiorari

To the United States Court Of Appeals
For The Fifth Circuit

APPENDIX VOL. 1

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APPENDIX TABLE OF CONTENT

Appendix A:
Final Judgment of the District Court. Pages 1-4

Appendix B:
Opinion issued by the Fifth Circuit Court of Appeals Pages 1-28

For the Eastern District of Texas
Tyler Division
(Jury Action)

Daniel Ray Unger, Plaintiff	**§**	
General Delivery	**§**	
United States Post Office	**§**	
Grapeland, Texas 75844	**§**	
	§	**Civil Action No.**
	§	**6:06cv466**
V.	**§**	**Complaint**
	§	
Greg Taylor, John Smith and	**§**	
Zak Montoya	**§**	

JUDGMENT

On this the 24TH day of June, 2008, at a regular term of this Court, came on to be heard the above entitled and numbered cause wherein **Daniel Ray Unger,** Plaintiff, and Greg Taylor, John Smith and

Zak Montoya are Defendants; and the Plaintiff appeared in person and through his duly appointed Standby Attorney, David Iglesias, and the Defendants appeared by and through their attorneys of record; whereupon, the jury proceeded to hear the evidence. At the conclusion of Plaintiffs case in chief, the court granted a directed verdict for Sheriff Greg Taylor. The jury, after having heard all the evidence were presented with the Jury Verdict Form and returned the verdict as follows:

Do you find by a preponderance of the evidence that Defendant Deputy John Smith deprived Plaintiff, Daniel Unger of a constitutionally guaranteed right by

performing a traffic stop without reasonable suspicion?

Answered "No."

Do you find by a preponderance of the evidence that Zak Montoya deprived Plaintiff Daniel Unger of a constitutionally guaranteed right by not providing otherwise available bedding to Daniel Unger during his confinement?

Answered "No.

Do you find by a preponderance of the evidence that Defendant Zak Montoya, as a form of punishment, deprived Plaintiff Daniel Unger of a constitutionally guaranteed right by taking away bedding that Plaintiff Daniel Unger acquired from another inmate?

Answered "No."

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the verdict reached was unanimous by all jurors and the Court accepted the verdict.

It is further ORDERED that Plaintiff take nothing by reason of the

jury verdict.

It is further ORDERED by the Court that all costs of court shall be and the same are hereby adjudged against the Plaintiff; and any relief prayed for and not herein specifically granted shall be and the same is hereby in all things denied.

s/_____

MICHAEL H. SCHNIEDER

UNITED STATE DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED
March 2, 2010
Charles R. Fulbruge III, Clerk

Nos. 08-40755 & 08-40945

DANIEL RAY UNGER,

Plaintiff-Appellant,

v.

SHERIFF GREG TAYLOR; DEPUTY SHERIFF JOHN SMITH; DEPUTY SHERIFF BRYAN CHASON; JAILOR ZAK MONTOYA; JUSTICE OF THE PEACE CARL DAVIS; ANDERSON COUNTY, TEXAS,

Defendants–Appellees,

Appeals from the United States District Court

for the Eastern District of Texas

USDC No. 6:06-CV-466

Before GARZA,
CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

Daniel Ray Unger appeals the district court's judgment on his claims under 42 U.S.C. § 1983. We affirm.

I

In 2005, as Unger was driving through Anderson County, Texas, with an out-of-state license plate, he was pulled over by Deputy Sheriff John Smith, purportedly for defective exhaust equipment. Deputy Smith asked Unger for his driver's license and proof of liability insurance, and Unger replied that he had neither. Deputy Smith then asked Unger for his name and date of birth. Unger gave the deputy his name and explained that he did not use a birthday since, as an identifying

number, it could be used to obtain a social security number, which would violate his deeply held religious belief of not being numbered. He also claimed that he could not be arrested since, as the "direct posterity of the American people," he had sovereign immunity.

Deputy Sheriff Bryan Chason arrived at the scene shortly after Deputy Smith. Deputy Smith frisked and handcuffed Unger, and Deputy Chason then transported Unger to the Anderson County Jail. Unger was booked on charges of operating a vehicle without liability insurance, operating a vehicle without a valid driver's license, and operating a motor vehicle with defective equipment. The following afternoon he was arraigned before Justice of the Peace Carl Davis. Unger refused to enter a plea. He was released the same day after posting $1,500 in bail.

Unger subsequently filed a petition for writ of habeas corpus against Sheriff Greg Taylor and

Justice Davis in the County Court of Anderson County, Texas. In a hearing on the petition, the court discovered that the charges against Unger were erroneously filed in the 2nd Precinct of Anderson County, rather than the 1st Precinct, where the alleged traffic offenses occurred. Because under Texas law misdemeanor cases are to be tried in the precinct in which the offenses occurred, the court ruled that Justice Davis did not have[1] proper venue and dismissed the charges against Unger. Unger's bail was then returned to him.

Unger, proceeding pro se, sued Sheriff Taylor, Deputy Smith, Deputy Chason, Jailor Zak Montoya, Justice Davis, and Anderson County, Texas, alleging numerous constitutional violations. He also brought state law claims of intentional infliction of emotional distress, false imprisonment, and malicious prosecution. Both Unger

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[1] *See* TEX. CODE CRIM. PROC. ANN. art. 4.12(a)(1).

and the defendants moved for summary judgment. The district court granted summary judgment in favor of the defendants based on qualified immunity for Unger's Fourth Amendment claim in connection with his arrest and subsequent detention, his Fourth Amendment claim in connection with the search of his person and the car, his Eighth Amendment claims related to the continuous illumination in the jail and the jail's unsanitary conditions, his First and Eighth Amendment claim that he was denied a diet in accordance with Biblical dietary laws, his Eighth Amendment claims that he was tortured, deprived of a blanket, and not allowed to make telephone calls, his claim that he was denied his constitutional right of access to the courts, his Fourth Amendment claim that he was not brought promptly before a magistrate, his Sixth Amendment claim for denial of access to an attorney, and his claim for violation of the right to travel. The court ruled that the defendants

were not shielded by qualified immunity on Unger's Fourth Amendment claim against Deputy Smith for the initial traffic stop and his Eighth Amendment claim that he was denied bedding. The court further ruled that Justice Davis was entitled to judicial immunity as to all of Unger's claims against him, that Unger had failed to state a claim of municipal liability against Anderson County, and that the defendants were entitled to summary judgment on all of Unger's state law claims. The court denied Unger's motion for summary judgment in its entirety.

Unger subsequently moved to amend his complaint, and the court denied the motion. His two remaining claims proceeded to trial, and the jury ruled in favor of the defendants on both claims.

Unger now presents five issues on appeal. First, he asserts that the district court abused its discretion when it denied his motion to amend his complaint.

Second, he claims that the district court erred in denying his motion for summary judgment. Third, he contends that the district court erred in partially granting the defendants' motion for summary judgment. Fourth, he avers that the district court abused its discretion in denying his motion to compel. And finally, he argues that the district court abused its discretion when it proceeded to hear the case after Unger filed an affidavit alleging judicial bias.

II

We review the district court's denial of a motion to amend the complaint for abuse of discretion. Federal Rule of Civil Procedure 15(a)(2) provides that[2] leave to amend the complaint should be given "freely . . . when justice so requires." But because Unger filed his motion to amend the complaint nearly[3] eleven months after the

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[2] *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 208 (5th Cir. 2009).

[3] FED. R. CIV. P. 15(a)(2).

deadline for amendments in the scheduling order, his motion to amend is governed by Rule 16(b). Under Rule 16(b), a scheduling[4] order may be modified only "for good cause." We consider four factors in[5] determining good cause: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice."[6]

Unger argued that the district court should allow amendment since he was pro se and had "inartfully pled" his claims. As reasons for the denial of Unger's motion, the district court cited the tardiness of the motion, the imminence of trial, and the defendants' failure to consent to the amendment.

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[4] *See Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348 (5th Cir. 2008).

[5] F ED. R. CIV. P. 16(b)(4).

[6] *Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 546 (5th Cir. 2003) (internal quotation marks omitted).

Under these circumstances, and considering Unger's failure to explain the untimeliness of his motion, the district court acted within its discretion in denying Unger leave to amend.

III

Unger next contends that the district court erred in denying his motion for summary judgment. But "an interlocutory order denying summary judgment is not to be reviewed where final judgment adverse to the movant is rendered on the basis of a subsequent full trial on the merits." Once trial begins, "the summary judgment motion effectively becomes[7] moot." Because Unger[8] received an adverse final judgment after a jury trial on the merits of his case, we will not consider his appeal from the denial of his motion for summary judgment.

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[7] *Black v. J.I. Case Co., Inc.*, 22 F.3d 568, 570 (5th Cir. 1994); *see also Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 n.4 (5th Cir. 2009) (noting that we normally decline to review a district court's denial of summary judgment after full trial on the merits).

[8] *Black*, 22 F.3d at 571.

IV

Unger also appeals from the district court's grant of partial summary judgment in favor of the defendants. We review the grant of a motion for summary judgment de novo, applying the same standard as the district court.[9] Summary judgment is appropriate when the competent summary judgment evidence demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[10]

Unger challenges seven of the rulings in the district court's order granting partial summary judgment. He challenges the district court's grant of summary judgment based on qualified immunity for (1) his Fourth Amendment claim in connection with his arrest and subsequent detention, (2) his Fourth Amendment claim in connection with

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[9] Threadgill v. Prudential Sec. Group, Inc., 145 F.3d 286, 292 (5th Cir. 1998).

[10] *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008).

the search of his car and his person, (3) his Fourth Amendment claim for failure to bring him promptly before a magistrate, (4) his claim for violation of the right to travel, and (5) his claims related to his punishment as a pretrial detainee. Unger also challenges: (6) the district court's ruling that Justice Davis was entitled to judicial immunity and (7) its dismissal of his claims for municipal liability against Anderson County.

A

Qualified immunity protects government employees against civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The[11] Supreme Court has articulated a two-prong inquiry into resolving government officials' qualified immunity claims. Under the first prong, the court must[12] decide whether the facts the plaintiff has

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[11] *Wernecke v. Garcia*, 591 F.3d 386, 392 (5th Cir. 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted).
[12] *Id.*

shown make out a violation of a constitutional right. The second prong requires the court to consider "whether[13] the right at issue was 'clearly established' at the time of defendant's alleged misconduct." The court may consider these prongs in any sequence.[14] [15] As to the second inquiry, a right is "clearly established" when "the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right." The focus is on[16] "fair warning" and whether the official would be "on notice" that his actions violated constitutional rights.[17]

1

Unger first contends that the district court erred in granting summary

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[13] *Pearson v. Callahan*, 129 S. Ct. 808, 815-16 (2009).

[14] *Id.* at 816.

[15] *Id.* at 818.

[16] *Wernecke*, 591 F.3d at 392 (internal quotation marks and citation omitted).

[17] *Id.* at 393.

judgment on his claim that Deputy Smith and Deputy Chason violated his Fourth Amendment rights by unlawfully arresting and detaining him. The district court ruled that the officers were entitled to qualified immunity since Unger had failed to show that they had violated a constitutional right.

To succeed on a constitutional claim for unlawful arrest, the plaintiff must show that the arrest was not supported by probable cause. "Probable cause[18] exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense."[19]

Deputy Smith asserts that he had probable cause to arrest Unger on three grounds: (1) driving without a license in violation of Texas Transportation Code §

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[18] *See Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009).

[19] *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004) (quoting *United States v. Levine*, 80 F.3d 129, 132 (5th Cir. 1996)) (internal quotation marks omitted).

521.021, (2) driving without liability insurance in violation of § 601.051, and (3) operating a vehicle with defective equipment in violation of § 547.605. It is undisputed that Deputy Smith asked Unger for his license and proof of insurance and that Unger responded that he had neither. At that point,[20] Deputy Smith had probable cause to arrest Unger for violation of § 521.021 and § 547.605. Accordingly, Unger has not shown that there are triable factual[21] issues as to whether the arrest violated his constitutional rights. The district court correctly granted summary judgment on this claim.

2

Unger next argues that the

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[20] A law enforcement officer may request the driver's license and vehicle registration in connection with a traffic stop. *See United States v. Brigham*, 382 F.3d 500, 507-08 (5th Cir. 2004).

[21] *See Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001) (holding that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

district court erred in granting summary judgment based on qualified immunity on his claim that Deputy Smith and Deputy Chason unlawfully searched his car and his person. Unger contends that the searches were unlawful since they were not incident to a lawful arrest. He does not contest the scope of the searches.

Law enforcement officers "may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence." Such warrantless searches may be performed in connection with[22] any arrest based on probable cause. Here, after Unger's arrest, Deputy Smith[23] and Deputy Chason performed a limited search of Unger's car, as well as his person and wallet, in an effort to find proof of insurance and vehicle registration. Because the arrest at issue was based on probable cause and thus lawful, the subsequent searches of Unger's car and person were also lawful. As such, the district court correctly granted

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[22] *Virginia v. Moore*, 128 S. Ct. 1598, 1607 (2008).
[23] *Id.*

summary judgment on this claim.

3

Unger next asserts that the district court erred in ruling that the officers were entitled to qualified immunity in connection with his claim that they violated his Fourth Amendment rights by failing to take him promptly before a magistrate.

The Supreme Court has held that persons arrested without a warrant "must promptly be brought before a neutral magistrate for a judicial determination of probable cause." The Court has further explained that[24] determinations of probable cause within 48 hours of arrest will generally be considered prompt. Still, a probable cause determination within 48 hours may[25] not pass constitutional muster if the arrested person can show that the determination was "delayed unreasonably." Examples of

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[24] *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991) (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)).

[25] *Id.* at 56.

unreasonable delay[26] might include "delay incurred for the purpose of gathering additional evidence to justify the arrest, delay motivated by ill will against the arrested individual, or delay for delay's sake."[27] Here, it is undisputed that Unger was arrested on October 27, 2005, booked into the jail at 11:23 a.m. that same day, and taken before Justice Davis for arraignment the following day at 1:47 p.m. Thus Unger's appearance before the magistrate occurred within the 48-hour time frame required by *McLaughlin*. However, the probable cause determination could still be unconstitutional if it was "delayed unreasonably." Defendants provided evidence that on October 28, 2005, Justice Davis completed his arraignments prior to the booking of Unger and held no other arraignments until the following day. Unger did not refute this evidence. Nor did he provide any evidence of unreasonable delay. Accordingly, Unger has not shown that

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[26] *Id.*

[27] *White v. Taylor*, 959 F.2d 539, 546 (5th Cir. 1992).

there are issues of material fact concerning whether the less than 48- hour delay violated his constitutional rights.

4

Unger next argues that the district court erred in dismissing his claim for violation of his constitutional right to travel. Although there is a fundamental right to travel, the Supreme Court has recognized that there are "situations in which a State may prevent a citizen from leaving," such as when "a person has been convicted of a crime within a State." The Court has further explained[28] that "even before trial or conviction, probable cause may justify an arrest and subsequent temporary detention" such that the person is "temporarily deprived of his freedom to travel elsewhere within or without the State." Here, as[29] discussed *supra*, Deputy Smith had probable cause to arrest Unger for driving without a license or liability insurance. Accordingly, Unger's brief detention did not violate his

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[28] *Jones v. Helms*, 452 U.S. 412, 419 (1981).
[29] *Id.*

right to travel, and the district court properly granted summary judgment on this claim.

Unger's brief also states that "the gravamen of his claim of punishment as a pretrial detainee is as follows" and then lists five problems he had with his pretrial detention, including his placement in a holding tank, his lack of access to a phone, his lack of access to pencil and paper, his lack of bedding, and his lack of visitation. His brief does not present any arguments with regard to these issues and does not address the district court's reasons for dismissing his claims. Although pro se briefs are liberally construed, "such litigants must still brief contentions in order to preserve them." Claims not adequately argued in a[30] brief are deemed abandoned on appeal. Accordingly, Unger has waived these[31] issues.

B

Unger also challenges the district

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[30] *Longoria v. Dretke*, 507 F.3d 898, 901 (5th Cir. 2007).
[31] *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

court's summary judgment ruling that Justice Davis is entitled to judicial immunity. Unger contends that Justice Davis "falsely acted in the capacity of a judicial officer in a case in which he was wholly lacking in jurisdiction."

A judge generally has absolute immunity from suits for damages. This immunity extends to justices of the peace. Judges do not, however,[32] have[33] immunity for "actions not taken in the judge's judicial capacity" or for "actions, though judicial in nature, taken in the complete absence of all jurisdiction." In[34] considering whether a judge's action was in the complete absence of jurisdiction, "the scope of the judge's jurisdiction must be construed broadly." A judge will[35] not be deprived of immunity merely because his action "was in error, was done maliciously, or

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[32] *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 221 (5th Cir. 2009) (citing *Mireles v. Waco*, 502 U.S. 9, 9-10 (1991)), *cert. denied*, 130 S. Ct. 624 (2009).

[33] *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982).

[34] *Mireles*, 502 U.S. at 11-12.

[35] *Stump v. Sparkman*, 435 U.S. 349, 356 (1978).

was in excess of his authority."[36]

Unger's contention that Davis's actions in arraigning him were "wholly lacking in jurisdiction" has no merit. All of the actions of which Unger complains—denying him the right to make a phone call in court, failing to make a finding of probable cause, denying his request for paper and pencil in court, and asking him to enter a plea to the charges—are judicial in nature. And while Justice Davis's actions may have been in error since Unger was taken to the wrong precinct, that does not render them performed "in the complete absence of jurisdiction." The district court correctly ruled that Justice Davis was[37] entitled to absolute immunity.

C

Unger's next challenge to the district court's summary judgment ruling concerns its dismissal of his claim against Anderson County. Unger contends that Anderson County intentionally violated his right to due

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[36] *Id.*

[37] *See id.*

process of law, right of access to courts, right to counsel, right not to be punished as a pre-trial detainee, and right to liberty.

A local government entity may be sued "if it is alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" To establish[38] municipal liability under § 1983, the plaintiff must show that "(1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right."[39]

Unger has not shown that there are issues of material fact as to whether Anderson County had an official policy resulting in constitutional torts. The official policy requirement can be met in at least three different ways: (1) when an

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[38] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 680 (1978)).

[39] *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009), *pet. for cert. filed*, No. 09-983 (Feb. 16, 2010).

"officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of the policy"; (2) when there is no official policy announced, "but the action of the policymaker itself violated a constitutional right"; or (3) when the policymaker fails to act affirmatively when the need to take action "is so obvious" that the policymaker's inaction renders it "deliberately indifferent to the need." Unger's convoluted[40] allegations appear to allege that Anderson County had policies or customs of incarcerating individuals "without authority of sworn complaints," punishing pre-trial detainees for their religious beliefs, and violating the constitutional rights of pre-trial detainees. But Unger has provided no competent summary judgment evidence to support his assertion that Anderson County had such a policy. His only piece of evidence—a statement in his affidavit that he spoke with a man

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[40] *Burge v. Parish of St. Tammany*, 187 F.3d 452, 471 (5th Cir. 1999).

named Howard Gambrell who was also "denied his rights as punishment for the exercise of his religious beliefs, placed in the holding tank of the Anderson County jail, and denied the right to use the phone to call counsel"—is not based on personal knowledge, and thus is not competent summary judgment evidence.[41]

Accordingly, Unger has not shown that there are triable issues of fact on the issue of municipal liability.

V

In addition to his specific challenges to the district court's summary judgment ruling, Unger argues that the ruling was improper since the defendants' summary judgment motion and reply should have been struck for noncompliance with the local rules. Specifically, Unger asserts that the defendants' motion for summary judgment failed to include a statement of undisputed material facts and failed to include appropriate citations to proper summary judgment

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[41] *See* FED. R. CIV. P. 56(c)(1).

evidence as required by Local Rule CV-56. Unger further argues that the magistrate judge should not have given consideration to the defendants' reply brief since it exceeded the page limitation in Local Rule CV-7 and was untimely. We review a district court's enforcement of the local rules for abuse of discretion. Here, the district court was within its discretion in refusing to[42] strike the defendants' summary judgment motion and reply brief. Contrary to Unger's allegations, the summary judgment motion contained a section of undisputed material facts and citations to the defendants' summary judgment evidence. And while the reply brief did exceed the page limitation, Local Rule CV-7(l) gives the district court discretion to allow motions in excess of the page limitation. Similarly, Local Rule CV-7(e) gives the court discretion to allow reply briefs beyond the typical five-day deadline. Under these circumstances, we find no abuse of discretion in the district court's refusal to strike the reply brief.

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[42] *United States v. Rios-Espinoza*, 591 F.3d 758, 760 (5th Cir. 2009).

VI

Unger next argues that the district court abused its discretion in denying his motion to compel production of certain personnel files. In his motion, Unger complained that the 1,000-page personnel file already produced by the defendants was illegible in parts. Defendants responded that the plaintiff could come by the sheriff's office to review the file personally.

We review the district court's denial of a motion to compel for abuse of discretion. A trial court's decision pertaining to discovery should be reversed[43] "only in an unusual and exceptional case." Here, the district court acted within[44] its discretion in denying the motion to compel since the defendants had already produced the personnel file and had also given Unger the opportunity to review the file in person.

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[43] *Burns v. Exxon Corp.*, 158 F.3d 336, 342 (5th Cir. 1998).

[44] *O'Malley v. U.S. Fid. & Guar. Co.*, 776 F.2d 494, 499 (5th Cir. 1985) (internal quotation marks omitted).

VII

Lastly, Unger contests the district court judge's refusal to recuse himself after Unger filed an affidavit alleging bias and moving for the judge's recusal under 28 U.S.C. § 144 and § 455. We review the denial of a motion to recuse for abuse of discretion. Section 144 relates to charges of "actual bias." To[45] [46] proceed under § 144, the movant must present an affidavit that meets the following requirements: "(1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." Under § 455, a judge must recuse[47] himself "in any proceeding in which his impartiality might reasonably be questioned." The standard is "whether a reasonable

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[45] *Matassarin v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999).

[46] *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir. 1990).

[47] *Id.*

person, with full[48] knowledge of all of the circumstances, would harbor doubts about the judge's impartiality."[49]

Unger's affidavit essentially alleges that the district court judge was biased because of his unfavorable rulings on Unger's numerous nonmeritorious motions, objections, and complaints. Because the alleged bias is "judicial," rather than "personal" in nature, the facts alleged do not meet the requirements for a § 144 affidavit. Neither do the allegations show that a reasonable person[50] would doubt the district court judge's impartiality. As such, the district court did not abuse its discretion in denying Unger's motion.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[48] 28 U.S.C. § 455(a).

[49] *Matassarin*, 174 F.3d at 571.

[50] *See Davis v. Bd. of Sch. Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975) (explaining that the alleged bias was not extra-judicial, but "very much judicial," since the movants were complaining of language in an order and an opinion).